Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
OCTOBER TERM 1998

MARIE PFAU,
Petitioner,

v.

WILLIAM REED,
IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF THE DEFENSE CONTRACT AUDIT AGENCY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the remedies afforded Petitioner Marie Pfau, a federal employee, for sexual harassment under Title VII of the Civil Rights Act of 1964 preempt Petitioner's remedies for intentional infliction of emotional distress under Texas state law and under the Federal Tort Claims Act, where Petitioner alleged some non-sexual, non-employment-related conduct by her supervisor.

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No. _____

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MARIE PFAU,
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v.

WILLIAM REED,
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Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Marie Pfau, Petitioner, respectfully prays that the Supreme Court of the United States issue a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered on February 8, 1999 and January 14, 1998.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued its original opinion in this case on October 27, 1997. (Appendix C.) After this Court granted a prior petition for writ of certiorari on October 5, 1998, the Fifth Circuit Court of Appeals issued an opinion on remand on February 8, 1999. (Appendix G.)

JURISDICTION

The jurisdiction of this Court to review the Fifth Circuit's judgment by writ of certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §§ 2000e-2000e-17

2. Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 et seq. (codified as amended in scattered sections of 5 U.S.C.)

3. Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-80

STATEMENT OF THE CASE

A. Procedural History

This case involves sexual harassment and intentional infliction of emotional distress. The Defense Contract Audit Agency ("DCAA"), Respondent, is a federal agency that audits contracts between the federal government and private contractors. Petitioner Marie Pfau ("Pfau"), who worked as an auditor for DCAA, filed this lawsuit against the DCAA and her first-line supervisor, Pete Gonzales ("Gonzales"), under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2000e-17 (as amended), for wrongful termination on the basis of gender discrimination, quid pro quo and hostile work environment sexual harassment, and retaliation for filing gender and sexual harassment complaints.[1] Pfau also brought claims against DCAA and Gonzales under the Federal Tort Claims Act ("FTCA") and under Texas state law for intentional infliction of emotional distress.

DCAA filed a motion to dismiss Pfau's emotional distress claims, asserting preemption by the Civil Service Reform Act ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111 et

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[1]Pfau sued Gonzales individually and in his official capacity. Pfau's original complaint also named as defendants DCAA (as an entity), the United States Department of Defense, and William J. Perry, in his official capacity as Secretary of Defense. The trial court found that William Reed, as the director of DCAA, was the sole proper defendant to the lawsuit.

seq. (codified as amended in scattered sections of 5 U.S.C.). The district court denied DCAA's motion.

DCAA filed a motion for reconsideration. The trial court reversed its prior decision, granted DCAA's motion for reconsideration, and dismissed Plaintiff's emotional distress claims with prejudice. The trial court held that the CSRA and Title VII preempt claims for intentional infliction of emotional distress brought by a federal employee against the federal government.

DCAA filed a motion for summary judgment regarding Pfau's sexual harassment claims, asserting Pfau failed to establish a prima facie case of respondeat superior. The trial court granted the motion.

The trial court entered final judgment in the case, and Pfau appealed. On October 27, 1997, a panel of the United States Fifth Circuit Court of Appeals, relying on its own precedents, affirmed the trial court, and held that: (1) Title VII preempted Pfau's emotional distress claims[2]; (2) Gonzales was not DCAA's agent within Title VII's definition of "employer"; and (3) Pfau failed to show the element of respondeat superior regarding her sexual harassment claims. The Fifth Circuit denied Pfau's Petition for Panel Rehearing on January 14, 1998.

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[2]Finding the Title VII issue dispositive, the panel specifically did not reach the issue of the preemptive effect, if any, of the CSRA.

On April 14, 1998, Pfau filed her petition for writ of certiorari with this Court, presenting two questions for review. One regarded the preemptive effect, if any, of Title VII on Pfau's claims under the FTCA and Texas state law for intentional infliction of emotional distress. The other question regarded whether Gonzales could be deemed DCAA's agent under Title VII.

On October 5, 1998, this Court granted Pfau's petition for writ of certiorari, vacated the Fifth Circuit's judgment, and remanded the case to the appellate court for further consideration in light of *Burlington Industries v. Ellerth*, 524 U.S. ____, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. ____, 118 S. Ct. 2275 (1998).

On February 8, 1999, the Fifth Circuit issued an opinion vacating the district court's grant of summary judgment on the Title VII agency issue and remanding the case to the district court, but reinstating part of its prior opinion and affirming the district court's dismissal of Pfau's claims for intentional infliction of emotional distress.

B. Statement of Facts

Pfau was subject to repeated instances of sexual and emotional harassment by Gonzales, her first-line supervisor. Gonzales would often make physical contact with Pfau's private areas, including her breasts, buttocks, arms, shoulders, and torso. Gonzales continuously

pressured Pfau for sex, including intercourse and oral sex. Gonzales also inflicted non-sexual conduct upon Pfau, such as harassing telephone calls to her home and constant demands for money.

In December 1992, Pfau instigated a formal complaint of sexual harassment against Gonzales. Gonzales was subject to no disciplinary action regarding the complaint. After Plaintiff filed the complaint, the sexual harassment continued. Gonzales made a sexually suggestive telephone call to Pfau in July 1993. Gonzales remained Pfau's immediate supervisor until DCAA terminated her employment in November 1993.

C. Basis for Federal Jurisdiction in the District Court

The district court had subject matter jurisdiction of this case under: (1) Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §§ 2000e-2000e-17; (2) the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-80; and (3) 28 U.S.C. § 1331 (federal question).

REASON FOR GRANTING THE PETITION

Remedies afforded federal employees for sexual harassment under Title VII of the Civil Rights Act of 1964 do not preempt tort remedies under Texas state law and under the Federal Tort Claims Act where the employee alleges some non-sexual, non-employment-related conduct by her supervisor.

The protections Title VII affords federal government employees to be free from sexual harassment, as well as remedies available to state citizens for tortious, non-sexual conduct, are important matters which should be considered by this Court. This writ of certiorari should be granted because the Fifth Circuit's opinion conflicts with this Court's holding in *Brown v. General Serv. Admin.*, 425 U.S. 820 (1976), in which this Court held that Title VII preempts a state law cause of action brought by a federal employee only when it is "not sufficiently distinct to avoid" preemption. Simply put, the court of appeals erred because Pfau alleged facts to support both her Title VII claim and her state law claims.

In addition, the Fifth Circuit's opinion in this case is contrary to the well-reasoned opinion of the Ninth Circuit in *Brock v. United States*, 64 F.3d 1421 (9th Cir. 1995), in which the court of appeals held that a federal employee's FTCA cause of action against the federal government was not barred by Title VII.

Regarding the issue, the Fifth Circuit in this case wrote:

> We have interpreted the Supreme Court's mandate in *Brown* [*v. General Servs. Admin.*, 425 U.S. 820 (1976)] to mean that, when a complainant against a federal employer relies on the same facts to establish a Title VII claim and a non-Title VII claim, the non-Title VII claim is "not sufficiently distinct to avoid" preemption. *Rowe v. Sullivan*, 967 F.2d 186, 189 (5th Cir. 1992); *see also Jackson v. Widnall*, 99 F.3d 710, 716 (5th Cir. 1996).

Pfau v. Reed, 125 F.3d 927, 932 (5th Cir. 1997).

Based on this premise, the Fifth Circuit held that although "some of the alleged harassment occurred away from the office and after business hours," Title VII still preempted Pfau's FTCA and state law emotional distress claims because, "All of the factual allegations in Pfau's complaint support her claim under Title VII." *Id.* at 933.

The Fifth Circuit went too far by holding that where a plaintiff alleges conduct which would constitute sexual harassment in some respects or even in most respects, then conduct which is not sexual harassment is bootstrapped onto the other. Under the Fifth Circuit's analysis, a federal employee can **never** have both a Title VII claim and a non-Title VII claim because the claims will always stem from the "same facts." Rather than

focusing on whether the "same facts" support both claims, the analysis should focus on whether Pfau alleged facts which could support both claims. *See Brown*, 425 U.S. at 829.

The Fifth Circuit erred in its Title VII holding for two reasons. **First, the Fifth Circuit erred because some conduct alleged by Pfau cannot be sexual harassment because it was not sexual conduct** -- for example, Gonzales demanded money and all-expense-paid vacations from Pfau, and he tormented her with repeated phone calls to her home at night. There is no **sexual content** to this conduct because it does not entail "sexual advances, request[s] for sexual favors, and other verbal or physical conduct of a sexual nature." *See Jones v. Flagship Int'l*, 793 F.2d 714, 719 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); 29 C.F.R. § 1604.11(a) (1992). Unlike other circuits,[3] the Fifth Circuit has held that the conduct alleged by a sexual harassment claimant must be explicitly sexual. *See, e.g., Jones*, 793 F.2d at 719. The Fifth Circuit is inconsistent in its interpretation of Title VII because it will not allow a federal employee, Pfau, who alleges non-sexual conduct, the remedies afforded under the FTCA and state law to compensate for injuries not defined as employment discrimination.

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[3] *See, e.g., Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013-14 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1991); *McKinney v. Dole*, 765 F.2d 1129, 1139 (D.C. Cir. 1985) (all holding that a sexual harassment claimant need not allege conduct explicitly sexual).

Further, some of this conduct cannot be employment-related because it occurred off the DCAA premises, after hours, and was unconnected to Pfau's job; therefore, the conduct did not affect a term, condition, or privilege of Pfau's employment. *See Jones*, 793 F.2d at 719-20; *see also* 29 C.F.R. § 1604.11(a); 42 U.S.C. § 2000e-16(a) (Title VII provision barring discrimination in "personnel actions affecting [federal] employment").

Often the Fifth Circuit has held that non-sexual, non-work-related conduct was not hostile work environment sexual harassment. *See, e.g., Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 193-95 (5th Cir. 1996) (supervisor indicating employee a "Jezebel" not sexual harassment; jury verdict reversed); *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190, 195-96 (5th Cir. 1991) (unwelcome physical contact with employees not sexual harassment); *Jones*, 793 F.2d at 721 (repeated requests for sexual intercourse not sexual harassment because no tangible job detriment).

In this case, the Fifth Circuit held that Gonzales asking Pfau for money was sexual harassment. If calling an employee a "Jezebel" (*see Weller*), unwanted touching (*see Collins*), and asking for sex (*see Jones*) is not sexual harassment, but asking for money is, there is no consistency in the Fifth Circuit's interpretation of Title VII.[4]

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[4]Later in its opinion, the Fifth Circuit concludes that Gonzales asking a witness in the case, Mary Lou Kirschbaum, to pick up an expensive dinner

By lumping all conduct alleged by Pfau together, the Fifth Circuit has effectively nullified *Brown* and deemed non-sexual, non-work-related conduct as constituting sexual harassment.

Unless this Court is willing to countenance holding employers liable for sexual harassment under Title VII for non-sexual, non-employment-related conduct, then federal employees should be allowed the remedies afforded by the FTCA and by state law. Most important, this Court should establish some consistency in the interpretation of Title VII among the circuits.

Second, the cases the Fifth Circuit cited as authority do not support its conclusion. *Brown* held that a federal employee could not pursue a Title VII claim because he did not file the suit within the required time. This Court's pronouncement that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment," *see Brown*, 425 U.S. at 835, does not relate to whether Title VII preempts remedies afforded to a federal employee under the FTCA and state law for non-employment-related conduct.

The same is true for the other cases cited by the Fifth Circuit. The plaintiff in *Rowe v. Sullivan*, 967 F.2d 186, 189

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tab was not hostile work environment sexual harassment. 125 F.3d at 939 n.8. One is left to wonder why Gonzales asking Pfau for money or to pay for trips is sexual harassment under the Fifth Circuit's reasoning.

(5th Cir. 1992), claimed his suspension was racially motivated, and he filed suit under Title VII and 42 U.S.C. §§ 1981, 1983, and 1985(3). The court held that "the same facts" -- i.e., the suspension -- were "not sufficiently distinct to avoid" preemption by Title VII. *Id.* In *Jackson v. Widnall*, 99 F.3d 710, 715 (5th Cir. 1996), the employee claimed the government's failure to hire him for one job and his discharge from another constituted race discrimination under Title VII and unspecified "constitutional violations." The court held that Title VII preempted these claims "Insofar as Jackson's allegations of constitutional violations arise out of the same facts as his employment discrimination claims. . . ." *Id.* at 716 (citing *Rowe*).

Therefore, the courts in *Rowe* and *Jackson* did not consider whether a federal employee that alleges some non-discriminatory, non-employment-related conduct would have her FTCA or state law claims preempted by Title VII. In fact, the Fifth Circuit refers to no case even remotely similar to this case to make its wide pronouncements regarding the preemptive effect of Title VII.

By contrast, in a case all fours on point, *Brock v. United States*, 64 F.3d 1421 (9th Cir. 1995), the Ninth Circuit held that a federal employee's FTCA cause of action against the federal government was not barred by Title VII. The employee alleged that her immediate supervisor subjected her to unwanted sexual comments, advances, and contact culminating in rape. 64 F.3d at 1422. The Government moved for dismissal of the complaint, arguing

that the employee's FTCA claim was precluded by Title VII. *Id.* at 1422-25. The district court agreed, and dismissed Brock's claim. *Id.* at 1422. The court of appeals reversed, holding that Title VII did not bar the employee's claim. *Id.* at 1423-24.

The Ninth Circuit's analysis of Title VII began with its understanding that it "is the exclusive, preemptive administrative and judicial scheme available for the redress of federal employment discrimination." *Id.* at 1423 (quoting *Brown*, 425 U.S. at 829 (internal punctuation omitted)); *see also* 42 U.S.C. § 2000e-16. The court's analysis did not end here, however:

> Although McKinney's rape and sexual assault of Brock is sufficient to establish a claim of sexual discrimination, **that conduct also constitutes more than sexual discrimination. . . . Title VII is not the exclusive remedy for federal employees who suffer "highly personal" wrongs, such as defamation, harassing phone calls, and physical abuse** . . . .
>
> Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee's sex. In both instances, however, the ability to characterize the ultimate harm suffered as including a lesser offense (*i.e.*, battery or discrimination) does not change the nature or extent of the ultimate harm. **When the harms suffered involve something**

> more than discrimination, the victim can bring a separate claim. . . .
>
> Accordingly, we hold that, because the conduct alleged in Brock's complaint is highly personal violation beyond the meaning of discrimination, the complaint states a claim that is separately actionable under the FTCA.

Id. at 1423, 1424 (citations omitted) (emphasis added); *see also Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 654 (5th Cir. 1994), and *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 265 (5th Cir. 1991) (differentiating Title VII sexual harassment and other harassment resulting in emotional injury).

The holding of *Brock* is all fours on point with the facts of this case, and the court directly held that Title VII did not preclude the federal employee's FTCA claim. A conflict in the circuits exists because the Fifth Circuit summarily passed over the court's reasoning in *Brock*, stating, "We decline to adopt the position taken by the Ninth Circuit in *Brock* because it is inconsistent with the jurisprudence of this circuit." *See Pfau*, 125 F.3d at 933 n.2 (citing *Jackson* and *Rowe*).

Other courts have followed the same reasoning as the court in *Brock*. *See Ray v. Nimmo*, 704 F.2d 1480, 1485 (11th Cir. 1983) (Title VII does not preempt constitutional claim by federal employee); *Brunetti v. Rubin*, 999 F. Supp. 1408, 1410-12 (D. Colo. 1998) ("when the harms

suffered by the federal employee involve more than discrimination, such harms may implicate other distinct rights, such as the right to be free from . . . intentional infliction of emotional distress"); *Stewart v. Thomas*, 538 F. Supp. 891, 893 (D. D.C. 1982) (under *Brown*, Title VII does not subsume or preempt all claims that rely on the same nucleus of operative facts); *Arnold v. United States*, 816 F.2d 1306, 1311 (9th Cir. 1987) (remedy for unconstitutional actions other than employment discrimination, even if arising from the same core of facts, is not barred by Title VII); *Otto v. Heckler*, 781 F.2d 754, 756-57 (9th Cir.) (highly personal violations beyond the meaning of "discrimination" are separately actionable), *amended by* 802 F.2d 337 (9th Cir. 1986); *but see Fusco v. Cohen*, No. 92-CV-1525 (FJS), 1998 U.S. Dist. LEXIS 5038, at *6 (N.D.N.Y April 3, 1998) (citing Fifth Circuit's opinion in *Pfau*, the court held that the plaintiff's state law claim for intentional infliction of emotional distress was preempted by Title VII).

In *Brown*, this Court's inquiry into the legislative history of Title VII focused on whether federal employees should be able to bring parallel actions under both Title VII and other provisions of federal law to redress the same basic injury. Nothing in that history, however, suggests that Congress intended to prevent federal employees from suing their employers and supervisors for common law violations against which Title VII provides no protection at all. Here, Pfau bases her Title VII claim against DCAA and her tort claim against

Gonzales on two distinct and independent rights: the right to be free from discriminatory treatment at one's work site, and the right to be free from emotional injury caused intentionally by another person. *See Brock*, 64 F.3d 1421 1423-24; *Brunetti*, 999 F. Supp. at 1411-12.

This Court should grant this petition for writ of certiorari because the Fifth Circuit has misinterpreted *Brown*, and has adopted reasoning in conflict with its own precedents and those from other circuits. This Court should take this opportunity to clarify any apparent conflict between Title VII, the FTCA, the CSRA, and state law tort remedies for federal employees by adopting the sound reasoning of the Ninth Circuit in *Brock*.

CONCLUSION

This Court should grant this writ of certiorari because the Fifth Circuit's opinion leaves Pfau and others similarly situated without a remedy for their injuries. Therefore, this proceeding involves a question of exceptional importance.

The Fifth Circuit's conclusions regarding Pfau's first issue on appeal (Title VII preemption) and her second issue on appeal (sexual harassment) are flatly contradictory. Regarding the first issue, the Fifth Circuit held that all conduct alleged by Pfau was employment-related. Regarding the second issue, the Fifth Circuit concluded Pfau's sexual harassment claims fail because the conduct

she alleged was not sufficiently employment-related:

> "Pfau's contention that the factual allegations of her first amended complaint 'cannot reasonably be read as conduct constituting *only* employment-related sexual harassment' likewise does not establish the absence of Title VII preemption. **The mere fact that some of the alleged harassment occurred away from the office and after business hours** does not support Pfau's contention that the district court 'misconstrued which factual allegations supported which claims.' All of the factual allegations in Pfau's complaint support her claim under Title VII." 125 F.3d at 933 (emphasis added).

> "Pfau has not produced summary judgment evidence indicating that Gonzales's alleged sexual harassment was so pervasive that the DCAA should have known about it as it was happening. **Pfau's affidavit indicates that much of Gonzales's alleged sexually harassing behavior took place outside the office (e.g., telephone calls at home and visits to her apartment).**" 125 F.3d at 938-39 (emphasis added).

The result of the Fifth Circuit's reasoning is that federal law trumps state law and vice versa, leaving Pfau and others like her without a remedy for their wrongs. Simply put, the Fifth Circuit was taken a remedial law, Title VII, which exists to protect workers against employment discrimination, and has made it a Catch-22 for employees. The holding contravenes the intent of Congress to protect federal workers from job discrimination, and the Texas courts to shield state citizens from mental trauma.

In this case, Pfau sued Gonzales for intentional infliction of emotional distress in both his official and unofficial capacity. The Fifth Circuit's holding is especially troubling because the court affirmed the trial court's dismissal of the claim against Gonzales in his unofficial capacity. The effect of the Fifth Circuit's Title VII preemption analysis is to shield federal employees, like Gonzales, from being held responsible for intentional torts committed outside the course and scope of employment.

As the circuit courts apply this Court's pronouncements in *Faragher* and *Ellerth* to various fact situations, it is critical that this Court continue to direct the courts below to follow congressional intent, not activist agendas. After *Meritor Savs. Bank v. Vinson*, 477 U.S. 57 (1986), some circuits strayed so far from the path laid out by this Court that we moved backward, not forward, in advancing civil rights. This Court can prevent this from happening again by reversing the Fifth Circuit, and setting forth clear principles regarding the interplay among Title VII, the FTCA, the CSRA, and state law.

Marie Pfau, Petitioner, respectfully requests that this Court grant her petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARIE PFAU	§	
	§	
V.	§	A-95-CA-135 ADA
	§	
DEFENSE CONTRACT	§	
AUDIT AGENCY, ET AL.	§	

ORDER

Before the Court is the Motion to Dismiss of Defendants Defense Contract Audit Agency, William Reed, in his Official Capacity as Director of the Defense Contract Audit Agency ("DCAA"), United States Department of Defense ("DOD"), William J. Perry, in his Official Capacity as Secretary of Defense, and Pete Gonzales, in both his official and individual capacity, ("Defendants") filed on July 24, 1995 (Clerk's Doc. No. 16). Plaintiff Marie Pfau filed her Response to the Defendant's Motion on August 7, 1995 (Clerk's Docket No. 21).

This is a Title VI claim. Plaintiff has also alleged violations of the Civil Rights Act of 1991, 42 U.S.C. § 1977A. Plaintiff was an employee of the DCAA, a component of the DOD, with a duty station in Austin, Texas. The Defendants terminated the Plaintiff on November 9, 1993. The plaintiff maintains that she was terminated on the basis of her gender, that her workplace was a hostile work environment, or that her termination was an act of retaliation.

Who is a Properly Named Defendant?

The Defendants argue that the court should dismiss the Plaintiff's claims against all of the Defendants other than the Secretary of Defense. The Defendants argue that Title 42

U.S.C.§ 2000e-16(c) and Title 42 U.S.C. § 2000e-5 restricts the universe of potential defendants to the head of the appropriate agency or department. In this case, the Secretary of Defense is the head of the Department of Defense. 10 U.S.C. § 113. Defendant DCAA argues that it does not qualify as a department or independent agency. Rather, Defendants argue, it is a subdivision of the Department of Defense. The Plaintiff argues that Title 32 C.F.R. § 357.3 establishes the DCAA as a "separate agency of the department of Defense."

Defendants Reed and Gonzales also argue that they should not be named as Defendants. They argue that the department head is the sole proper defendant in a Title VII action. Brown v. Department of Army, 854 F.2d 77 (5th Cir. 1988). Plaintiff responds that if DCAA is properly named as a separate agency, then Defendant Reed, the director of the DCAA, is properly named. Plaintiff argues that Defendant Gonzales is alleged to have intentionally inflicted emotional distress on her; therefore, he is properly named as a Defendant. The Court finds that the Defendants have failed to persuade it that any of the Defendants should be dismissed from the case.

Are Plaintiff's Tort Claims Preempted?

Defendants argue that the Plaintiff's claim of intentional infliction of emotional distress is preempted by the Civil Service Reform Act of 1978 ("CSRA"). Defendants argue that the CSRA is a detailed comprehensive effort by the Congress to regulate employee-management relations in the federal government. Defendants argue that Congress can, and has in this case, precluded judicial review of claims that arise in federal employment decisions. Defendants cite a host of cases that hold that CSRA precludes relief under the Federal Torts Claims Act.

Defendants argue that Plaintiff cannot raise a claim of intentional infliction of emotional distress under the FTCA. The Plaintiff argues that the Fifth Circuit has determined that a person can bring such a claim under the FTCA. Truman v.

United States, 26 F.3d 592, 595 (5th Cir. 1994). The Plaintiff has correctly cited Fifth Circuit law. The Truman case clearly allows the Plaintiff to proceed with this claim.

Defendants argue that CSRA preempts state law remedies for adverse personnel actions. Plaintiff argues that her claim of intentional infliction of emotional distress does not arise from an adverse employment decision, but from other wrongful actions taken by these Defendants. She argues that her cause of action is not a Bivens or constitutional tort type claim.

Exhaustion of Administrative Remedies Under the FTCA.

Defendants argue that section 2675(a) of the FTCA, 28 U.S.C. 2675(a), prohibits the institution of a judicial tort action "unless the claimant has first presented the claim to the appropriate federal agency and his claim has been denied by the agency in writing. Defendants argue that exhaustion is a jurisdictional prerequisite. Shah v. Quinlin, 901 F.2d 1241, 1244 (5th Cir. 1990). The Plaintiff responds that the parties have already spent two years in administrative review, and that the administrative process has concluded with a final agency decision. The Plaintiff has already presented a sum certain at the time that she filed her charge.

The Court DENIES the Defendants' Motion to Dismiss.

SIGNED this the 9th day of Austin [sic], 1995, at Austin, Texas.

Alan D. Albright

ALAN D ALBRIGHT
UNITED STATES MAGISTRATE JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARIE PFAU	§	
	§	
V.	§	A-95-CA-135 ADA
	§	
DEFENSE CONTRACT	§	
AUDIT AGENCY, ET AL.	§	

ORDER

Before the Court is the Motion to Reconsider of Defendants Defense Contract Audit Agency, William Reed, in his Official Capacity as Director of the Defense Contract Audit Agency ("DCAA"), United States Department of Defense ("DOD"), William J. Perry, in his Official Capacity as Secretary of Defense, and Pete Gonzales,[1] in both his official and individual capacity, ("Defendants") filed on August 21, 1995 (Clerk's Doc. No. 23). Plaintiff Marie Pfau filed her Response to the Defendant's Motion on August 31, 1995 (Clerk's Docket No. 24). A hearing was held on October 10, 1995.

It is undisputed that the Plaintiff was an employee of the DCAA, a component of the DOD, with a duty station in Austin, Texas. As such, the Plaintiff was a federal civil-service employee. The Defendants terminated the Plaintiff on November 9, 1993. The Plaintiff maintains that she was terminated on the basis of her gender, that her workplace was a hostile work environment, and that her termination was an act of retaliation. She alleges that the Defendants violated her

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[1]Defendant Gonzales is Plaintiff's former first-line supervisor.

rights under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. Plaintiff has also alleged violations of the Civil Rights Act of 1991, 42 U.S.C. § 1977A. The Plaintiff also seeks recovery for her claim of intentional infliction of emotional distress.

Who is a Properly Named Defendant?

The Defendants argue that the Court should dismiss the Plaintiff's claims against all of the Defendants other than the Secretary of Defense. The Defendants argue that Title 42 U.S.C. Section 2000e-16(c) restricts the universe of potential civil rights defendants to the head of the appropriate agency or department. Brown v. Department of Army, 854 F.2d 77, 79 (5th Cir. 1988). In this case, the Secretary of Defense is the head of the Department of Defense. 10 U.S.C. § 113. The Plaintiff argues that the statutory definition of "employer" includes "any agent of such a person" engaged in an industry affecting commerce, and that all of the named Defendants fall within that provision. The Court has reconsidered its earlier decision, and is of the opinion that it erred. The statute is clear. The Plaintiff has misread the statutory definition of "employer," and has misconstrued the plain wording of § 2000e-16. The definition of employer in § 2000e-16 pertains to private, or non-government parties. The Court finds that the Defense Contract Audit Agency is a separate "department, agency, or unit" for Title VII purposes. William Reed, as the Director of the DCAA, is the sole proper Defendant to the Title VII claim of gender discrimination.

Are Plaintiff's Tort Claims Preempted?

Defendants argue that the Plaintiff's claim of intentional infliction of emotional distress is preempted by the Civil

Service Reform Act of 1978 ("CSRA")[2] and by Title VII of the Civil Rights Act of 1964. The CSRA is a detailed comprehensive effort by Congress to regulate employee-management relations in the federal government. The CSRA replaced the old civil-service system to provide "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." United States v. Fausto, 484 U.S. 439, 108 S.Ct. 668, 672 (1988). The court finds that the CSRA provides the exclusive remedy for claims of federal employees arising out of civil service employment context. Rollins v. Marsh, 937 F. 2d 134, 139 (5th Cir. 1991). The Plaintiff's claims concern allegations of continuing harassment and denial of employment privileges and opportunities in the workplace. The Court has carefully reviewed the Plaintiff's allegations in her pleadings, and is of the opinion that her claims address issues of her employment and are therefore preempted by the CSRA.

The Plaintiff also asserts a Title VII claim. The CSRA expressly reserves federal employees' rights and remedies under anti-discrimination statues, including Title VII. The Defendants argue that Title VII and/or the CSRA provide the Plaintiff with the exclusive remedies with regard to her particular claims. The Court relies on the case of Bush v. Lucas, 462 U.S. 367, 103 S.Ct. 2404 (1983), in which the Supreme Court held that because the plaintiff's claims arouse out of an employment relationship that was governed by the CSRA that allowed meaningful remedies against the United States, that it would be improper to supplement that regulatory scheme with a nonstatutory damages remedy. The Supreme Court noted that the CSRA is a comprehensive and exhaustive administrative scheme. Id. at 2417.

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[2]Pub.L. No. 95-454, 92 Stat. 1111 et seq., (codified as amended at 5 U.S.C.).

The Court has reexamined the case of Truman v. United States, 26 F. 3d 592, 595 (5th Cir. 1994) in light of the Defendants' Motion for Reconsideration. The Defendants argue that none of the cases that the Fifth Circuit relied on in the Truman decision involved a suit in which the government argued that the CSRA or Title VII barred the tort claim. The Defendants emphasize that the plaintiff in Truman was not a government employee, but was a private employee asserting a FTCA claim. Had Truman been a government employee the Fifth Circuit would have barred her tort claim. The Court holds that, to the extent that Plaintiff's claim of intentional infliction of emotional distress involve allegations of adverse employment decisions, that those claims are precluded by the CSRA.

The Court next addresses whether Plaintiff's remaining claims for intentional infliction of emotional distress are preempted by Title VII. Plaintiff again argues that her claim of intentional infliction of emotional distress does not arise from an adverse employment decision, but from other wrongful actions taken by these Defendants. In response, the Defendants note that in the Plaintiff's First Amended Complaint, the Plaintiff relies on the same factual allegations to support her Title VII clams as she does for her claim of intentional infliction of emotional distress. The Court finds that the factual predicate for the Plaintiff's claim is also the basis of her Title VII claim.

The Court is of the opinion that the better-reasoned decisions that have addressed this question have held that Title VII is the exclusive judicial remedy for claims of discrimination in federal employment. Madrid v. Rice, 730 F. Supp. 1078, 1083 (D. Wyo. 1990) (citing, Brown v. General Services Administration, 425 U.S. 820, 833-34, 96 S.Ct. 1961, 1968-69 (1976)). The Court holds that the CSRA and Title VII preempt the Plaintiff's state law claims for intentional infliction of emotional distress. The Court DISMISSES WITH PREJUDICE the Plaintiff's claim for intentional infliction of emotional distress.

The Court GRANTS the Defendants' Motion for Reconsideration.

SIGNED this the 24th day of October 1995, at Austin, Texas.

Alan D. Albright

ALAN D ALBRIGHT
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

Marie PFAU, Plaintiff-Appellant,

v.

William REED, In His Official Capacity as Director of the Defense Contract Audit Agency, Defendant-Appellee.

No. 96-50916.

United States Court of Appeals, Fifth Circuit.

Oct. 27, 1997.

Bruce A. Coane, Jon Allan Haslett, Coane & Associates, Houston, TX, for Plaintiff-Appellant.

Ernest Carlos Garcia, Austin, TX, for Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas.

Before KING, DUHÉ and WIENER, Circuit Judges.

KING, Circuit Judge:

Plaintiff-appellant Marie Pfau appeals the district court's dismissal of her claims of intentional infliction of emotional distress and grant of summary judgment in favor of defendant-appellee William Reed in his official capacity as Director of the Defense Contract Audit Agency on her claims of sexual harassment. We affirm.

I. BACKGROUND

This case arises out of the alleged sexual harassment of plaintiff-appellant Marie Pfau while an employee of the Defense Contract Audit Agency ("DCAA") by Pete Gonzales, Pfau's first-line supervisor during a portion of her tenure with the DCAA. We are called upon to evaluate the propriety of the district court's dismissal of Pfau's claims of intentional infliction of emotional distress and grant of summary judgment in favor of defendant-appellee William Reed in his official capacity as director of the DCAA as to her claims of sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17.

A. Facts [1]

Pfau worked for the DCAA for ten years prior to her involuntary termination on November 9, 1993. In October of 1992, she transferred into the DCAA audit team supervised by Gonzales. Pfau alleges that Gonzales immediately began making "lewd and suggestive comments" to her and "request[ing] sexually provocative behavior from" her. Pfau alleges that Gonzales requested that she take him on a trip with her and made sexual advances that she rejected. Pfau contends that, upon discovering her vacation plans for December 1992, Gonzales began asking Pfau to allow him to accompany her on her trip and to pay his way. Pfau also alleges that Gonzales asked her for money on several other occasions.

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[1]The recitation of facts in this subpart is limited to the factual allegations of Pfau's complaint. Applicable summary judgment evidence is discussed in Part II.B, *infra*.

Different versions of Pfau's complaint were pending before the district court at the time that it dismissed her claim of intentional infliction of emotional distress and at the time that it entered summary judgment against her on her sexual harassment claims. However, the factual allegations in each version are similar in all material respects.

Pfau claims that, during her first month in Gonzales's audit group, Gonzales called and insisted on visiting Pfau at her apartment. According to Pfau, he came to her apartment and insisted that they become involved. Pfau avers that she refused to comply with Gonzales's demands.

Pfau filed charges of sexual harassment and discrimination against Gonzales, along with retaliation and reprisal charges. Pfau contends that Gonzales engaged in acts of retaliation for her filing sexual harassment charges against him, including "sabotaged work assignments to prevent completion, hindering performance, withdrawing assignments, invalidating [Pfau's] audit findings, inappropriately discussing audit findings with contractor personnel, and subjecting her to harsh, inordinate, and unwarranted criticism of work assignments." Pfau alleges that Gonzales denied her the training necessary to successfully advance to higher level assignments. She also contends that Gonzales began to assign her to auditing projects that did not comport with her level of experience, placed her on a performance improvement plan, and ultimately terminated her for filing sexual harassment charges against him. Pfau further claims that Gonzales denied her request for sick leave on April 15, 1993.

Pfau avers that, during the investigation of her sexual harassment charges against Gonzales, DCAA counselors pressured her to withdraw the charges that she filed against Gonzales "in return for a transfer or promises that her impending termination would be halted." Pfau declined to withdraw her complaint. Pfau also alleges that DCAA counselors failed to document her complaints and only acknowledged them after she complained to DCAA management on numerous occasions. Pfau contends that she was ultimately compelled to contact the DCAA's central office equal employment opportunity personnel in order to procure proper documentation of her claims. She claims that the DCAA never conducted an impartial evaluation of her job performance and charges of sexual harassment prior to her

termination.

B. Procedure

On March 7, 1995, Pfau filed her original complaint, naming as defendants Reed in his official capacity as Director of the DCAA, the United States Department of Defense, William J. Perry in his official capacity as Secretary of the Defense, and Pete Gonzales, both in his individual and official capacities (collectively "defendants"). The complaint alleged causes of action for sexual harassment under Title VII and the Civil Rights Act of 1991 and a claim of intentional infliction of emotional distress. On June 19, 1995, Pfau filed her first amended complaint.

On July 24, 1995, the defendants filed a motion seeking dismissal of all claims against all defendants except the Secretary of Defense and dismissal of Pfau's claim of intentional infliction of emotional distress. The court initially denied the motion, but upon a motion for reconsideration, reversed its earlier ruling in an October 24, 1995 order. It dismissed Pfau's claim of intentional infliction of emotional distress with prejudice and held that the Director of the DCAA was the only proper party defendant with respect to Pfau's Title VII claims.

On October 27, 1995, Pfau filed her second amended complaint, which added the United States as a party defendant and asserted a claim of intentional infliction of emotional distress against it under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680. Pfau's second amended complaint also retained her cause of action for intentional infliction of emotional distress against Gonzales in his individual and official capacities.

The DCAA filed a motion to correct the caption of the case and to dismiss Pfau's second amended complaint. The court granted the motion and ordered Pfau to correct her complaint so that it complied with the court's October 24, 1994 order. Accordingly, on January 18, 1996, Pfau filed her third amend-

ed complaint, which named only the Director of the DCAA in his official capacity as a defendant and dropped her claim of intentional infliction of emotional distress.

On April 19, 1996, the DCAA filed a motion for dismissal of Pfau's sexual harassment claims or, in the alternative, partial summary judgment. On August 16, 1996, the district court rendered summary judgment in favor of the DCAA on Pfau's sexual harassment claims. Pfau filed a timely notice of appeal.

II. DISCUSSION

Pfau argues that the district court erred in (1) dismissing her claims of intentional infliction of emotional distress against the DCAA and Gonzales in his individual capacity and (2) granting summary judgment in favor of the DCAA on Pfau's sexual harassment claims. We analyze the propriety of the court's order of dismissal and grant of summary judgment in turn.

A. Dismissal

1. *Standard of Review*

We review a dismissal on the pleadings de novo, applying the same standard as the district court. *See Truman v. United States*, 26 F.3d 592, 593 (5th Cir. 1994). "Accordingly, we accept the well-pleaded allegations in the complaint as true, and we construe those allegations in the light most favorable to the plaintiff." *Id.* at 594. We will therefore uphold the dismissal of Pfau's intentional infliction of emotional distress claims "only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Rubinstein v. Collins*, 20 F.3d 160, 166 (5th Cir.1994) (internal quotation marks omitted.)

2. Analysis

The district court dismissed Pfau's intentional infliction of emotional distress claims on the ground that they are pre-

empted by the Civil Service Reform Act ("CSRA"), Pub.L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.), and Title VII. We do not address the preemptory effect of the CSRA because we conclude that Pfau's claims are preempted by Title VII.

Pfau acknowledges that Title VII provides the "exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Brown v. General Servs. Admin.*, 425 U.S. 820, 829, 96 S.Ct. 1961, 1966, 48 L.Ed.2d 402 (1976). We have interpreted the Supreme Court's mandate in *Brown* to mean that, when a complainant against a federal employer relies on the same facts to establish a Title VII claim and a non-Title VII claim, the non-Title VII claim is "not sufficiently distinct to avoid" preemption. *Rowe v. Sullivan*, 967 F.2d 186, 189 (5th Cir.1992); *see also Jackson v. Widnall*, 99 F.3d 710, 716 (5th Cir.1996).

Pfau advances four arguments as to why her claims of intentional infliction of emotional distress are nonetheless not preempted by Title VII. First, Pfau argues that the elements that a plaintiff must prove in order to establish a claim of quid pro quo or hostile environment sexual harassment under Title VII are different from the elements necessary to establish a claim of intentional infliction of emotional distress. Second, Pfau urges that the purposes serves by Title VII and the cause of action for intentional infliction of emotional distress are distinct; the former serves to "strike at the entire spectrum of disparate treatment of men and women in employment," *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986) (internal quotation marks omitted), whereas the latter serves to protect individuals from injuries to their psyches. *See Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex.1993). Third, Pfau contends that she has advanced types and instances of conduct in support of her intentional infliction of emotional distress claims different from those she has advanced in support of her Title VII claims. Fourth, Pfau contends that her claim against the DCAA is cognizable under

the FTCA, and therefore cannot be preempted by Title VII. None of these arguments warrants the conclusion advanced by Pfau regarding the scope of Title VII preemption.

First, the fact that the legal elements a plaintiff must establish in order to state a claim of sexual harassment are different from those necessary to state a claim for intentional infliction of emotional distress does not preclude preemption because the same facts may establish different legal elements. For example, a claimant seeking to establish a claim of hostile environment discrimination must prove, among other things, that the claimant suffered unwelcome, harassing sexual conduct. *See Jones v. Flagship Int'l*, 793 F.2d 714, 719-20 (5th Cir.1986). A claimant seeking to establish a claim for intentional infliction of emotional distress must prove, among other things, that the claimant was subject to extreme and outrageous conduct. *See Twyman*, 855 S.W.2d at 621. While these are distinct legal elements, the same facts may nonetheless establish both of them in many circumstances. By establishing the occurrence of sexually harassing conduct, a plaintiff may at the same time establish the existence of extreme and outrageous conduct.

Second, the fact that private actions under Title VII and the common law tort of intentional infliction of emotional distress serve different purposes cannot dictate our decision as to preemption. As demonstrated above, sexually harassing conduct may also be extreme and outrageous conduct, and vice versa. When the same set of facts supports a Title VII claim and a non-Title VII claim against a federal employer, Title VII preempts the non-Title VII claim. *See Jackson*, 99 F.3d at 716; *Rowe*, 967 F.2d at 189. Under the controlling case law in this circuit, the existence of multiple reasons for preventing a particular type of conduct is therefore irrelevant to the determination of preemption.

Third, Pfau's contention that the factual allegations of her first amended complaint "cannot reasonably be read as conduct constituting *only* employment-related sexual harass-

ment" likewise does not establish the absence of Title VII preemption. The mere fact that some of the alleged harassment occurred away from the office and after business hours does not support Pfau's contention that the district court "misconstrued which factual allegations supported which claims." All of the factual allegations in Pfau's complaint support her claim under Title VII.

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), the Supreme Court concluded that a plaintiff who suffered sexual harassment both during and after office hours had stated a claim under Title VII. *Id.* at 66-67, 106 S.Ct. at 2405-06. The fact that the Court discussed at length the plaintiff's allegations of sexual harassment outside the office setting indicates that those allegations formed part of the basis for the plaintiff's Title VII claim. *See id.* at 60-61, 106 S.Ct. at 2402-03. The Court stated that

> "[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Id. at 67, 106 S.Ct. at 2405 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir.1982). Clearly, the "gauntlet of sexual abuse" that an employee is required to run need not be confined to working hours in order to affect a "'term, condition, or privilege' of employment within the meaning of Title VII. *Id.* Thus, we reject Pfau's contention that her allegations that Gonzales called her at home and demanded that she take him on vacation with her are not allegations that support her Title VII claims. Pfau cannot avoid Title VII preemption by picking and choosing which of her factual allegations she wishes to allocate to her Title VII claims and to her independ-

ent torts claims.[2]

Fourth, Pfau's contention that her intentional infliction of emotional distress claim against the DCAA is not preempted by Title VII because it is otherwise cognizable under the FTCA lacks merit. Assuming that the claim is not barred by the FTCA, this fact plainly does not preclude Title VII preemption. In *Brown*, the Supreme Court observed that "a precisely drawn, detailed statute pre-empts more general remedies." *Brown*, 425 U.S. at 834, 96 S.Ct. at 1968. Because Congress has manifested a clear intent that Title VII serve as the "exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination," *id.* at 829, 96 S.Ct. at 1966, Pfau cannot seek relief for such discrimination through the more general remedy afforded by the FTCA.

Pfau also challenges the district court's dismissal of her intentional infliction of emotional distress claim against Gonzales in his individual capacity. However, the district court's dismissal of Pfau's claim against Gonzales in his capacity was proper for the same reasons that the court's dismissal of Pfau's claim against the DCAA was proper. Title VII's preemptive effect as to claims against individual supervi-

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[2]Pfau urges us to adopt the position on Title VII preemption taken by the Ninth Circuit in *Brock v. United States*, 64 F.3d 1421 (9th Cir.1995). In that case, the plaintiff, a former employee of the Forest Service, brought suit under the FTCA against the United States for negligent supervision based on her being raped and otherwise sexually harassed by her supervisor. *See id.* at 1422. The court concluded that, while the plaintiff's rape clearly constituted a form of sexual discrimination, it was also "more than sexual discrimination," and therefore justified the plaintiff's assertion of non-Title VII claims against the government. *Id.* at 1423. We decline to adopt the position taken by the Ninth Circuit in *Brock* because it is consistent with the jurisprudence of this circuit. So long as the factual predicate of a claimant's non-Title VII claims is the same as the factual predicate for the claimant's Title VII claims against a federal agency, we are bound to conclude that Title VII preempts the Non-Title VII claims. *See Jackson*, 99 F.3d at 716; *Rowe*, 967 F.2d at 189.

sors is coextensive with its preemptive effect as to claims against federal agencies. *See Newbold v. United States Postal Serv.*, 614 F.2d 46, 47 (5th Cir.1980); *Cazalas v. United States Dep't of Justice*, 569 F.Supp. 213, 225-27 (E.D.La.1983), *aff'd*, 731 F.2d 280 (5th Cir.1984).

B. Summary Judgment

1. *Standard of Review*

"We review a grant of summary judgment de novo, applying the same criteria used by the district court in the first instance." *Texas Manufactured Housing Ass'n v. City of Nederland*, 101 F.3d 1095, 1099 (5th Cir.1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2497, 138 L.Ed.2d 1003 (1997). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554-55, 91 L.Ed.2d 265 (1986).

2. *Analysis*

The district court entered summary judgment in favor of the DCAA on Pfau's claims of quid pro quo and hostile environment sexual harassment. The court observed that Pfau's claim of quid pro quo sexual harassment required proof of the following elements:

(1) "that she is a member of a protected group;"

(2) "that she was subject to unwelcome sexual harassment;"

(3) "that the complained-of harassment was based upon sex;"

(4) "that her reaction to the harassment affected tangible aspects of the terms and conditions of her employment, with her acceptance or rejection of the harassment being either an express or implied condition to receipt of a

benefit to or the cause of a tangible adverse effect on the terms or conditions of her employment;" and
(5) "*respondeat superior.*"

Ellert v. University of Texas, 52 F.3d 543, 545 (5th Cir.1995). The court further observed that Pfau's claim of hostile environment sexual harassment required proof of the following elements:

"(1) [t]he employee belongs to a protected group ...;
(2) [t]he employee was subject to unwelcome sexual harassment, i.e. sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature that is unwelcome in the sense that it is unsolicited or unincited and is undesirable or offensive to the employee;
(3) [t]he harassment complained of was based upon sex ...;
(4) [t]he harassment complained of affected a 'term, condition or privilege of employment,' i.e., the sexual harassment must be sufficiently severe as to alter the conditions of employment and create an abusive working environment;
(5) [r]espondeat superior, i.e., that the employer knew or should have known of the harassment in question and failed to take prompt remedial action."

Waltman v. International Paper Co., 875 F.2d 468, 477 (5th Cir.1989) (brackets and ellipses in original) (quoting *Jones v. Flagship Int'l,* 793 F.2d 714, 719-20 (5th Cir.1986)).

The district court concluded that no genuine issue of material fact existed as to the *respondeat superior* element of either Pfau's quid pro quo or hostile environment sexual harassment claims.[3]

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[3]Use of the term "*respondeat superior*" as an element in claims of quid pro quo and hostile environment sexual harassment may be a bit misleading to the extent that the term traditionally implies strict employer liability. See BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 760-61 n. 85 (3d ed.1996). In the context of quid pro quo and hostile

Pfau challenges the district court's entry of summary judgment against her on her sexual harassment claims on the ground that a genuine issue of material fact exists as to the *respondeat superior* elements of both her quid pro quo and hostile environment sexual harassment claims. Pfau advances two theories in support of this proposition. First, she argues that a genuine issue of material fact exists as to whether Gonzales was her "employer" within the meaning of Title VII's definition of that term. She contends that, if Gonzales was her employer, then the DCAA is strictly liable under Title VII for Gonzales's harassment. Second, she argues that, even if Gonzales is not her employer or an agent thereof, a genuine issue of material fact exists as to whether the DCAA knew or should have known of his harassment of Pfau and other DCAA employees and failed to take prompt remedial action. We find each of these arguments to be without merit.[4]

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environment sexual harassment prima facie claims, the term means more generally a legal basis for employer responsibility. *See id.*

[4]In contending that genuine issues of material fact precluded the district court's entry of summary judgment against her, Pfau relies to a large extent on excerpts from her second amended affidavit, which she submitted to the district court along with her motion for reconsideration of the court's order granting summary judgment. The DCAA contends that, because this affidavit was not before the district court when it rendered summary judgment for the DCAA, we cannot consider it on appeal. The DCAA correctly observes that "materials not presented to the district court for consideration of a motion from summary judgment are never properly before the reviewing court on appeal from the judgment granting the motion." *Munoz v. International Alliance of Theatrical Stage Employees*, 563 F.2d 205, 209 (5th Cir. 1977). However, "[i]f [a] party seeking reconsideration submits additional materials , the trial court may consider those materials in its discretion. If a lower court does consider the materials and still grants summary judgment to the moving party, the appellate court may review all of the materials *de novo*." *Fields v. City of S. Houston*, 922 F.2d 1183, 1188 (5th Cir.1991) (citations omitted).

The district court's order denying Pfau's motion for reconsideration

a. *Gonzales as "Employer"*

Title VII prohibits employers from, among other things, "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, *and any agent of such a person* ...." 42 U.S.C. § 2000e(b) (emphasis added). While the plain language of the above provisions facially appears to provide a basis for rendering agents of an employer personally liable for their discriminatory acts, this circuit has interpreted Title VII's definition of employer as merely importing common law agency principles of *respondeat superior* liability. *See Grant v. Lone Star Co.*, 21 F.3d 649, 652 (5th Cir.1994) ("[T]he purpose of the 'agent' provision in § 2000e(b) was to incorporate *respondeat superior* liability into Title VII."). Thus, the actions of one who constitutes an agent of an employer may be considered for purposes of imposing Title VII liability on the employer.

Pfau contends that Gonzales was the DCAA's agent within the meaning of Title VII, and that his knowledge of his own sexually harassing conduct is imputed to the DCAA, rendering it strictly liable under Title VII. We reject this contention.

In *Meritor*, the Supreme Court rejected the notion that supervisory personnel are agents per se within the meaning of Title VII's definition of employer, and thus rejected the notion

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states that "[t]he Court has carefully reviewed the foregoing [motion and affidavits] and finds that these additional affidavits do not in any way merit a reversal of the Court's grant of Defendant's Motion for Partial Summary Judgment." Because the district court obviously considered the additional affidavits submitted by Pfau and still concluded that summary judgment was properly granted, we may review these affidavits as well.

that employers are strictly liable for the sexually harassing conduct of their supervisors in all circumstances. *See Meritor*, 477 U.S. at 72, 106 S.Ct. at 2407-08. The Court "decline[d] ... to issue a definitive rule on employer liability" for the actions of supervisory personnel, but indicated that common law agency principles may be useful in determining the situations in which a supervisor constitutes an employer's agent for Title VII purposes. *See id.* at 72, 106 S.Ct. at 2407-08.

Pfau contends that *Meritor*, along with cases in this circuit and others interpreting it, establishes that Gonzales was the DCAA's agent within the meaning of Title VII's definition of employer, and thus that his sexually harassing conduct is directly attributable to the DCAA.[5]

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[5]To date, cases in this circuit that have broached the issue of whether a supervisor is an agent of an employer for purposes of Title VII have not expressly differentiated between the existence of an agency relationship for purposes of a quid pro quo sexual harassment claim and the existence of such a relationship for purposes of a hostile environment sexual harassment claim. To the extent that a determination that a supervisory employee is the employer's agent provides a basis for holding the employer strictly liable for the supervisor's harassing conduct, it is possible that a supervisor may be the employer's agent for purposes of supervisory conduct that constitutes quid pro quo sexual harassment, but not for purposes of supervisory conduct that constitutes hostile environment sexual harassment. See LINDEMANN & GROSSMAN, *supra*, at 755, 812 (observing that "[m]ost courts have found employers automatically liable for the actions of their supervisory personnel in quid pro quo cases," but that [h]ostile environment sexual harassment normally does not trigger respondeat superior liability because sexual harassment rarely, if ever, is among the official duties of a supervisor"). In *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir.1982), the case that set forth the frameworks for prima facie claims of quid prop quo and hostile environment sexual harassment adopted in this circuit, *see Jones*, 793 F.2d at 719-20, 721-22, the Eleventh Circuit explained the distinction regarding the propriety of

strict employer liability for supervisory conduct constituting quid pro quo and hostile environment sexual harassment:

> In the classic *quid pro quo* case an employer is strictly liable for the conduct of its supervisors, while in the work environment case the plaintiff must prove that higher management knew or should have known of the sexual harassment before the employer may be held liable. The rationale underlying this difference in the treatment of the two cases is easily stated. The environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, or even strangers to the workplace. The capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual. When a supervisor gratuitously insults an employee, he generally does so for his reasons and by his own means. He thus acts outside the actual or apparent scope of the authority he possesses as a supervisor. His conduct cannot automatically be imputed to the employer any more so than the conduct of an ordinary employee.
>
> The typical case of quid pro quo sexual harassment is fundamentally different. In such a case, the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. Therein lies the *quid pro quo*. In that case the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose. He acts within the scope of his actual or apparent authority to hire, fire, discipline or promote. Because the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer when he makes employment decisions, his conduct can fairly be imputed to the source of his authority. *Id.* at 910 (citations, internal quotation marks, and footnotes omitted). However, Pfau has relied both on appeal and at the district court level almost exclusively on cases addressing the issue of agency, and thus the applicability of strict employer liability, in the context of hostile environment claims and does not contend that Gonzales may be an agent of the DCAA for purposes of her quid pro quo claim but not for purposes of her

We disagree. The summary judgment evidence indicates that, as a first-line supervisor, Gonzales lacked the authority to hire and fire agency employees and could only recommend that employees receive awards or be subject to disciplinary action. Gonzales could also issue assignments to auditors and determine the number of hours allocated to each assignment. The case law in this circuit indicates that this degree of authority is, as a matter of law, insufficient to establish that a supervisor is an agent within the meaning of Title VII.

In *Garcia v. Elf Atochem N.A.*, 28 F.3d 446 (5th Cir.1994), this court concluded that immediate supervisors may be agents of employers within the meaning of Title VII's definition of employer when they are "'delegated the employer's traditional rights, such as hiring and firing." *Id.* at 451 (quoting *Quijano v. University Fed. Credit Union*, 617 F.2d 129, 131 (5th Cir.1980)). While the court acknowledged that the phrase "any agent" in Title VII's definition of employer was entitled to a liberal construction, it declined to extend the definition "to include all supervisory personnel, not just those with the ability to hire and fire." *Garcia*, 28 F.3d at 451.

We recognize that some authority exists for the proposition that a supervisor need not have the authority to hire and fire in order to be considered an agent of the employer for Title VII purposes. *See Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 397 (5th Cir.1996). ("[T]he Fourth Circuit has explained, '[The agent] need not have ultimate authority to

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hostile environment claim. We decline to raise this issue on our own motion, and decide the case based on the arguments advanced by the parties. *See In re Quenzer*, 19 F.3d 163, 165 (5th Cir.1993) ("Typically, we will not consider on appeal matters not presented to the trial court."). Because we conclude that Gonzales was not the DCAA's agent with respect to Pfau's hostile environment claim, we also conclude that he was not an agent for purposes of her quid pro quo claim.

hire and fire to qualify as an employer, as long as he or she has significant input into such personnel decisions.'" (quoting *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir.1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir.1990) (en banc))), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2434, 138 L.Ed.2d 195 (1997). However, even courts that take this more liberal approach acknowledge that the supervisor must exercise "significant control over the plaintiff's hiring, firing or conditions of employment." *Paroline*, 879 F.2d at 104. The summary judgment evidence in this case indicates that the minimal authority wielded by Gonzales falls short of such significant control.[6] We therefore conclude that the district court did not err in ruling as a matter of law that Gonzales was not Pfau's employer for purposes of determining the DCAA's liability Title VII.[7]

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[6]Pfau makes much of the fact that Gonzales stated in a memorandum to the DCAA regional director that he "was instrumental and mainly responsible for the proper procedural handling of the termination of Ms. Pfau." However, the fact that Gonzales managed the procedural aspects of Pfau's termination in no way indicates that he had significant input in the decision to fire her.

[7]In *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir.1986), a case not relied upon by Pfau, a panel of this court took an expansive view of the "any agent" provision of Title VII's definition of employer. In that case, the court concluded that fire department supervisors whose authority was limited to tasks such as assigning cars and staffing shifts were employers within the meaning of 42 U.S.C. § 2000e(b). *See id.* at 442. The court reasoned that "'[a] person is an agent under § 2000e(b) if he participated in the decision-making process that forms the basis of the discrimination.'" *Id.* at 443 (quoting *Jones v. Metropolitan Denver Sewage Disposal Dist.*, 537 F.Supp. 966, 970 (D.Colo.1982)).

The court premised its expansive reading of § 2000e(b) on the notion that a narrower reading "would encourage supervisory personnel to believe that they may violate Title VII with impunity." *Id.* This rationale for the court's interpretation of § 2000e(b) presupposes that individual employees such as the supervisors at issue could be held liable in their individual capacities under Title VII. *See Harvey v. Blake*, 913 F.2d 226, 228 n. 2 (5th

b. *The DCAA's Knowledge and Remedial Action*

Pfau argues in the alternative that a genuine issue of material fact exits as to whether the DCAA knew or should have known of Gonzales's harassment of Pfau and other DCAA employees and failed to take prompt remedial action. She advances two theories in support of this proposition: (1) the DCAA had actual knowledge of Gonzales's harassment of her and failed to take prompt remedial action, and (2) sexual harassment by Gonzales and other officials was so pervasive, open, and obvious that the DCAA had constructive notice of Gonzales's harassment of her and failed to take prompt remedial action. The summary judgment evidence that Pfau has submitted fails to create a genuine issue of material fact as to either of these theories.

Pfau contends that the DCAA had actual notice that Gonzales had harassed her and other DCAA employees prior to December 9, 1992, the date on which she first complained to upper management that Gonzales had sexually harassed her. She contends that, on April 16, 1992, she wrote a letter to Martin Munoz, the former Central Region EEO officer in Irving, Texas, complaining of sexual harassment. However, the letter contains no reference to sexual harassment by Gonzales, and only complains of conduct of female co-workers.

Pfau also claims that a September 12, 1992 memorandum

Cir.1990). Prior to *Hamilton*, a panel of this circuit held that public officials could not be held liable in their individual capacities under Title VII. See *Clanton v. Orleans Parish Sch. Bd.*, 649 F.2d 1084, 1099-100 (5th Cir. Unit A July 1981). Thus, to the extent that *Hamilton's* broad reading of § 2000e(b) is premised upon a legal conclusion that would effectively overrule a prior panel opinion, we do not feel constrained to apply it in this case. *See Ryals v. Estelle*, 661 F.2d 904, 906 (5th Cir. Nov.1981) ("It has long been a rule of this court that no panel of this circuit can overrule a decision previously made by another.").

that she sent to Dale Collins, the DCAA's Director of Personnel, establishes that the DCAA had knowledge of her harassment by Gonzales prior to December of 1992. The memorandum states generally that "[t]he responsibility of management to prevent sexual harassment is not being performed." However, it contains no allegations of sexual harassment on the part of Gonzales, and actually urges that Gonzales "should be given fair treatment." The memorandum therefore provided the DCAA with no notice that Gonzales had sexually harassed Pfau.

Finally, Pfau contends that Gonzales harassed two other DCAA employees--Tonya Scherchyl Martinez and Carolyn Pease--in 1990 and 1991 and that she reported these instances of supposed harassment to management. However, Pfau has offered no deposition testimony or affidavits from these other employees establishing that they experienced sexual harassment. Rather, she simply states in her own affidavit that these other employees told her that Gonzales had harassed them. This portion of Pfau's affidavit is incompetent summary judgment evidence because it consists of inadmissible hearsay. *See Barhan v. Ry-ron Inc.*, 121 F.3d 198, 202 (5th Cir.1997).

The competent summary judgment evidence that speaks directly to the DCAA's knowledge of Gonzales's alleged sexual harassment is limited to the affidavits of Michael Gonzales, the DCAA's Central Region EEO officer in Irving, Texas; James C. Bourne, Regional Audit Manager of the DCAA's Central Division; Harold J. Lamb, the former Branch Manager of the DCAA's Austin, Texas office; and Dennis Low, a supervisory auditor at the DCAA's Austin office. In each affidavit, the affiant states that he had no knowledge of any allegations of sexual harassment by Gonzales prior to Pfau's complaint in December 1992. Thus, no genuine issue of material fact exists as to whether the DCAA had actual knowledge of sexually harassing conduct on the part of Gonzales prior to December 9, 1992.

Likewise, no genuine issue of material fact exists as to

whether DCAA management should have known of such conduct prior to December 1992 based on the pervasiveness of sexual harassment within the agency. Pfau has not produced summary judgment evidence indicating that Gonzales's alleged sexual harassment was so pervasive that the DCAA should have known about it as it was happening. Pfau's affidavit indicates that much of Gonzales's alleged sexually harassing behavior took place outside the office (e.g., telephone calls at home and visits to her apartment). Pfau alleges that, on "many" occasions during working hours, Gonzales would stand very near her and that he "continuously pressured" her during working hours to take him on vacation. Pfau also states in her affidavit that on one occasion Gonzales called her into his office and requested that they have lunch at her apartment, a comment that she interpreted to be a request for sexual relations. Pfau also mentions a few other specific instances of sexually harassing conduct in Gonzales's office. She alleges that, on one occasion, he told her that her blouse was unbuttoned when it was not and that, on another, he told her to turn around so that he could see her backside. She also states that, on another occasion, Gonzales requested that Pfau stand very near him in his office and became angry when she would not move closer.

Pfau has also offered the affidavit of Mary Lou Kirschbaum, a former supervisory auditor in the DCAA's Austin office. In her affidavit, Kirschbaum states that on one occasion Gonzales sent a message to her during a business meeting requesting that she call him at his hotel and that on another occasion he requested that she call him at the home of the DCAA's Central Regional Director. She also claims that she accompanied Gonzales to dinner at an expensive restaurant and that he expected her to pay the bill. She indicates that Gonzales "brought up this incident in front of Dennis Low, who was then the special assistant to the Branch Manager of the DCAA Austin office," and that she was embarrassed by

this.[8]

Kirschbaum also states that she heard Gonzales make "sexual jokes, comments, and innuendoes during work hours" and that he would make "unwelcome sexual contact" with her and other female employees. Kirschbaum provides no description of the "sexual contact" to which she refers, nor any basis for her conclusion that the purported contact with other employees was unwelcome or sexual.

The above allegations of specific instances of Gonzales's sexually harassing conduct, while perhaps establishing a fact issue as to whether he created a hostile work environment for Pfau, do not create a genuine issue of material fact as to whether Gonzales's harassment was so open and obvious that the DCAA should be charged with constructive notice of it.[9] This conclusion is bolstered by the fact that much of the alleged conduct took place outside the working environment and the affidavits offered by Pfau contain little indication that any substantial portion of the alleged sexual harassment took

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[8]We question whether the above events described by Kirschbaum in any sense constitute hostile environment sexual harassment. Gonzales's requests for telephone calls and expectation that Kirschbaum pick up an expensive dinner tab, while perhaps inconsiderate, are not the sort of "severe or pervasive" conduct that would "'alter the conditions of [Kirschbaum's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67, 106 S.Ct. at 2405 (internal quotation marks omitted).

[9]In many cases the affidavits of Pfau and Kirschbaum simply state that the specific events that they describe occurred "before December 9, 1992" or "before Marie Pfau filed her formal sexual harassment complaint against Pete Gonzales" and provide no indication of how far in advance of Pfau's formal complaint the alleged conduct occurred. Thus, even if we were to conclude that a reasonable jury could find that the pervasiveness of Gonzales's alleged harassment provided the DCAA with constructive notice of it, Pfau has failed to create a fact issue as to the timeliness of the DCAA's response because she has provided no indication of how much time elapsed between the point of constructive notice and the DCAA's response.

place in the presence of other employees.[10]

We find further support for our conclusion that no genuine issue of material fact exists as to whether the DCAA had constructive notice of Gonzales's harassment of Pfau in the fact that the summary judgment evidence indicates that the DCAA had a structured, accessible grievance procedure that Pfau could (and ultimately did) use to provide the DCAA with actual notice of her harassment. In *Meritor*, the Supreme Court rejected the defendant employer's argument "that the mere existence of a grievance procedure and a policy against discrimination, coupled with the [plaintiff's] failure to invoke the procedure, must insulate [the defendant] from liability."

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[10]Pfau also argues that numerous other male supervisors at the DCAA also engaged in sexual harassment. She contends that the pervasiveness of sexual harassment by these other employees provided the DCAA with constructive notice that sexual harassment was occurring within the organization. However, Pfau's complaint is limited to allegations that Gonzales sexually harassed her. Accordingly, Pfau's complaint seeks recovery only for Gonzales's hostile environment and quid pro quo sexual harassment. We fail to see how harassment by other supervisors, regardless of how pervasive, could have provided the DCAA with constructive notice that Gonzales had been engaged in harassment.

Authority exists for the proposition that, when harassment is sufficiently pervasive, an employer may be liable on the basis of constructive knowledge. *See, e.g., Waltman v. International Paper Co.*, 875 F.2d 468,478 (5th Cir.1989). However, in the cases that have held employers liable on the basis that the pervasiveness of sexual harassment implies constructive knowledge, the pervasive conduct *is the conduct of which the plaintiff complains. See id.* (concluding that sexually explicit graffiti and multiple instances of unwanted physical contact that formed the basis of plaintiff's claim of hostile environment sexual harassment were also sufficiently pervasive to create a fact issue as to whether employer had constructive notice of harassment). In this case, Pfau has sought recovery only for the hostile environment created by Gonzales and Gonzales's quid pro quo sexual harassment. She does not seek recovery for hostile environment or quid pro quo sexual harassment by other supervisors. Accordingly, the pervasiveness of harassment by other supervisors cannot logically form a basis for holding the DCAA liable.

Meritor, 477 U.S. at 72, 106 S.Ct. at 2408. However, the court went on to point out that the defendant's nondiscrimination policy and grievance procedure suffered from two distinct infirmities: (1) the nondiscrimination policy "did not address sexual harassment in particular, and thus did not alert employees of their employer's interest in correcting that form of discrimination;" and (2) the grievance procedure would have required the plaintiff to report her harassment to her supervisor–the very person who had been sexually harassing her. *See id.* at 72-73, 106 S.Ct. at 2408-09. The court observed that, in the absence of these infirmities, the defendant's argument that the presence of these policies should insulate it from a finding of constructive notice "might be substantially stronger." *See id.* at 73, 106, S.Ct. at 2408.

The summary judgment evidence in this case indicates that (1) the DCAA had a specific policy against sexual harassment and provided sexual harassment training to employees and (2) the DCAA's grievance procedure did not require Pfau to report her harassment to Gonzales. As such, the DCAA's "procedures were better calculated to encourage victims of harassment to come forward" than the procedures at issue in *Meritor*. *Id.* We express no opinion as to whether the DCAA's grievance procedure and sexual harassment policy may of themselves bar a finding of constructive notice. However, the presence of these procedures, coupled with the sparse summary judgment evidence indicating that Gonzales's harassment of DCAA employees was open and pervasive, warrant our conclusion that no genuine issue of material fact exists as to whether the DCAA had constructive notice that Gonzales was harassing Pfau prior to her complaint in December 1992.

Pfau likewise has failed to raise a genuine issue of material fact as to the adequacy of the DCAA's remedial response once it had notice of Gonzales's alleged sexual harassment. In her affidavit, Pfau conclusorily states that the EEO counselors who investigated her formal complaint attempted to "whitewash"

her complaint and that she "believed that the investigators and counselors ... had little interest in getting at the truth." Such conclusory and speculative assertions are not competent summary judgment evidence. *See Lechuga v. Southern Pac. Transp. Co.*, 949 F.2d 790, 798 (5th Cir.1992) ("Conclusory statements in an affidavit do not provide facts that will counter summary judgment evidence, and testimony based on conjecture alone is insufficient to raise an issue to defeat summary judgment." (footnote omitted)).

The summary judgment evidence indicates that upon receiving Pfau's formal complaint, the DCAA's EEO department began a prompt investigation. Paula A. McFarland, an EEO counselor for the DCAA, meet with Gonzales. Her report on Pfau's complaint states that she spoke with Gonzales about sexual harassment training and complaint procedure and instructed him not to call Pfau at home. Harold Lamb, the DCAA Austin Branch Manager, states in his affidavit that he met with Gonzales and instructed him not to call DCAA employees after hours. He also states that he "reminded [Gonzales] about the DCAA policy prohibiting sexual harassment and admonished him to not engage in any activity which might in any way be considered unwelcome sexual harassment." This remedial response passes muster under Title VII. *See Waymire v. Harris County*, 86 F.3d 424, 429 (5th Cir.1996) (holding reprimand of employee who had engaged in sexual harassment sufficient as a matter of law where employee had no prior documented offenses); *Landgraf v. USI Film Products*, 968 F.2d 427, 430 (5th Cir.1992) ("Title VII does not require that an employer use the most serious sanction available to punish an offender, particularly where, as here, this was the first documented offense by an individual employee."), *aff'd*, 511 U.S. 44, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

Moreover, Pfau essentially admitted in deposition that Gonzales engaged in no more sexually harassing conduct after

she made her formal complaint.[11] McFarland's investigative report states that "Ms. Pfau stated that the comments and telephone calls had stopped and that I should just write in the EEO counselor's report that the problem was resolved." The summary judgment evidence thus indicates that no genuine issue of material fact exists as to whether the DCAA's remedial efforts were sufficient to avoid liability under Title VII.

Because no genuine issue of material fact exists with respect to either of the theories advanced by Pfau in support of imposing liability on the DCAA for Gonzales's alleged quid pro quo and hostile environment sexual harassment, the district court properly entered summary judgment in favor of the DCAA on Pfau's sexual harassment claims.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

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[11]Pfau contends that Gonzales made one more harassing statement to her in July of 1992 when she took a business trip to Corpus Christi. In deposition, she made the following statement:

> He told me that if I ever needed him I could call him and where was the location of my hotel room. And I thought that a pretty dangerous bunch of words for this guy to use.

However, Pfau admitted in deposition that she believed that this statement merely "bordered on harassment." It certainly does not create a fact issue as to the effectiveness of the DCAA's remedial response.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50916

MARIE PFAU
Plaintiff - Appellant

v.

WILLIAM REED, In His Official Capacity as Director of the Defense Contract Audit Agency
Defendant - Appellee

Appeal from the United States District Court for the Western District of Texas, Austin

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10/27/97, 5 Cir., , 1997 F.3d)

Before KING, DUHÉ, and WIENER, Circuit Judges.

PER CURIAM:

(x) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular

active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Carolyn Dineen King
United States Circuit Judge

APPENDIX E

Supreme Court of the United States

No. 1751

MARIE PFAU,

Petitioner

v.

WILLIAM REED, DIRECTOR,
DEFENSE CONTRACT AUDIT AGENCY

ORDER ALLOWING CERTIORARI. Filed October 5, 1998.

The petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

APPENDIX F

Supreme Court of the United States

No. 1751

MARIE PFAU,

Petitioner

v.

WILLIAM REED, DIRECTOR,
DEFENSE CONTRACT AUDIT AGENCY

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the cause is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Faragher v. City of Boca Raton*, 524 U.S. ___ (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. ___ (1998).

IT IS FURTHER ORDERED that petitioner Marie Pfau recover from William Reed, Director, Defense Contract Audit Agency, Three Hundred Dollars ($300.00) for costs herein expended.

October 5, 1998.

Clerk's costs: $300.00

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50916

MARIE PFAU,
Plaintiff - Appellant,

v.

WILLIAM REED, In His Official Capacity as Director of the Defense Contract Audit Agency,
Defendant - Appellee.

Appeal from the United States District Court
for the Western District of Texas

February 8, 1999

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before KING, Chief Judge, DUHÉ. and Wiener, Circuit Judges.
PER CURIAM:

This appeal is before us on remand from the United States Supreme Court for further consideration in light of its recent decisions in Faragher v. City of Boca Raton, 118 S. Ct. 2275

(1998), and Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998). See Pfau v. Reed, 119 S. Ct. 32 (1998), vacating 125 F.3d 927 (5th Cir. 1997). Having reviewed these decisions and the parties supplemental briefs, we reinstate part II(A) of our prior opinion and AFFIRM the district court's dismissal of plaintiff-appellant Marie Pfau's claims of intentional infliction of emotional distress. See Pfau v. Reed, 125 F.3d 927, 932-34 (5th Cir. 1997). The district court should reconsider its decision to grant summary judgment on Pfau's claims of sexual harassment in the light of Faragher and Ellerth. Without intending to limit the scope of that reconsideration, the district court should address the issue of whether Pete Gonzales was Pfau's supervisor under Faragher and Ellerth and, if so, whether the defendant-appellee has established the affirmative defense outlined in those cases. Further discovery on those issues may be required. Without in any way intimating our view as to the merits of Pfau's claims, we VACATE the district court's grant of summary judgment on Pfau's sexual harassment claims and REMAND this case to the district court for further proceedings.

AFFIRMED in part; VACATED and REMANDED in part. Each party shall bear its own costs.

Supreme Court, U.S.
FILED
AUG 11 1999
OFFICE OF THE CLERK

(2)

No. 98-1846

In the Supreme Court of the United States

MARIE PFAU, PETITIONER

v.

WILLIAM REED, DIRECTOR,
DEFENSE CONTRACT AUDIT AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, preempts petitioner's claims under the Federal Tort Claims Act and Texas state law for intentional infliction of emotional distress.

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In the Supreme Court of the United States

No. 98-1846

MARIE PFAU, PETITIONER

v.

WILLIAM REED, DIRECTOR,
DEFENSE CONTRACT AUDIT AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-39a) is reported at 167 F. 3d 228. The initial opinion of the court of appeals (Pet. App. 9a-33a) is reported at 125 F.3d 927.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1999. The petition for a writ of certiorari was filed on May 10, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a former employee of the Defense Contract Audit Agency (DCAA). Pet. App. 10a. Petitioner worked on an audit team where Pete Gonzales was her first-line supervisor. *Ibid.* Petitioner alleges that, when she first became a member of that team, Gonzales made lewd and suggestive comments to her and requested sexually provocative behavior from her. *Ibid.* Petitioner further alleges that Gonzales requested that she take him on a trip with her, made sexual advances she rejected, asked to go on vacations with her at her expense, and asked her for money on several occasions. *Ibid.* Petitioner also alleges that Gonzales called her, appeared at her home, and insisted that they become sexually involved. *Id.* at 11a.

Petitioner alleges that, after she complained to management that Gonzales had sexually harassed her, Gonzales retaliated against her. Pet. App. 11a. Among other things, she alleges that Gonzales gave her inappropriate work assignments, denied her training, and denied her request for sick leave. *Ibid.* Petitioner was ultimately fired from her job. *Id.* at 10a.

2. Petitioner filed suit in the United States District Court for the Western District of Texas against the Director of the DCAA and Gonzales among others. Pet. App. 12a. Petitioner alleged that Gonzales had subjected her to sexual harassment for which the DCAA was liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071 (42 U.S.C. 1981a). Pet. App. 12a. She also alleged against Gonzales a state law tort claim of intentional infliction of emotional distress. *Ibid.*

The district court dismissed petitioner's claim of intentional infliction of emotional distress. Pet. App. 4a-8a. The court held that Title VII and the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, preempted that claim. Pet. App. 5a-7a. Petitioner amended her complaint to add the United States as a defendant and to assert a claim of intentional infliction of emotional distress under the Federal Tort Claims Act (FTCA). *Id.* at 12a. Petitioner also reasserted her state law tort claim against Gonzales. *Ibid.* The district court dismissed both tort claims, once again relying on the preemptive force of Title VII and the CSRA. *Ibid.* The court then granted summary judgment in favor of the government on petitioner's Title VII claim, *id.* at 13a, holding that Gonzales did not qualify as petitioner's "employer" for purposes of imputing liability to the DCAA under Title VII, and that petitioner's evidence failed to raise an inference that DCAA had actual or constructive knowledge of Gonzales's alleged harassment prior to petitioner's formal complaint or that it had failed to take appropriate action following the complaint. See *id.* at 20a.

3. The court of appeals affirmed. Pet. App. 9a-33a. The court held that, under circuit precedent, "[w]hen the same set of facts supports a Title VII claim and a non-Title VII claim against a federal employer, Title VII preempts the non-Title VII claim." *Id.* at 15a. Finding that the same set of facts supported petitioner's Title VII claim and her intentional infliction of emotional distress claims, the court concluded that Title VII preempted petitioner's intentional infliction of emotional distress claims. *Id.* at 15a-18a. The court rejected petitioner's contention that her tort claims are distinct from her Title VII claim, because some of the

alleged conduct occurred away from the office and after business hours. *Id.* at 16a. The court explained that, under *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), those factual allegations support her Title VII claim. Pet. App. 16a.

The court of appeals also upheld the district court's grant of summary judgment dismissing petitioner's Title VII claim. Pet. App. 18a-33a. The court held that Gonzales was not petitioner's "employer" for purposes of Title VII under existing precedent, *id.* at 21a-26a, and that petitioner's evidence raised no genuine issue of material fact with regard to DCAA's knowledge of the alleged harassment prior to petitioner's formal complaint or the adequacy of its response following the complaint, *id.* at 26a-33a.

4. Petitioner sought certiorari, and this Court granted the petition, vacated the court of appeals' judgment, and remanded the case for further consideration in light of the intervening decisions in *Faragher* v. *City of Boca Raton*, 118 S. Ct. 2275 (1998), and *Burlington Indus., Inc.* v. *Ellerth*, 118 S. Ct. 2257 (1998). 119 S. Ct. 32 (1998). Those cases established the standards governing employer liability under Title VII for harassment committed by a supervisor.

On remand, the court of appeals reinstated the part of its prior opinion concerning Title VII's preemption of petitioner's claims of intentional infliction of emotional distress and reaffirmed the dismissal of those claims. Pet. App. 38a-39a. The court remanded petitioner's Title VII sexual harassment claim for further consideration and fact-finding by the district court, in light of *Faragher* and *Ellerth*. *Id.* at 39a.

ARGUMENT

1. Petitioner seeks review of the court of appeals' holding that Title VII preempts her claims under the Federal Torts Claims Act (FTCA) and Texas state law for intentional infliction of emotional distress. Because the court of appeals remanded the case for consideration of petitioner's Title VII claim, however, the case is in an interlocutory posture. This Court ordinarily refuses to grant review when the decision being challenged is interlocutory. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari) (this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction").

There is no reason to depart from the Court's usual practice here. Petitioner's challenge to the court of appeals' preemption ruling depends on her assertion that her claims involving intentional infliction of emotional distress are distinct from her Title VII claim. The court of appeals' remand order contemplates additional discovery and fact-finding on her Title VII claim that could cast further light on its relationship to her claims of intentional infliction of emotional distress. Such facts could provide additional support for the court of appeals' conclusion that all of the alleged conduct falls within petitioner's Title VII claim, or could cause the court to revisit that conclusion. If a live dispute persists on that issue after remand, petitioner will retain her right to present to this Court any claim she presents here so long as she has preserved it. See,

e.g., *Urie* v. *Thompson*, 337 U.S. 163, 172-173 (1949); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993).

2. Even if petitioner's challenge to the court of appeals' preemption ruling were ripe, it would not warrant review. In *Brown* v. *GSA*, 425 U.S. 820, 835 (1976), this Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." The court of appeals in this case interpreted that holding to mean that "[w]hen the same set of facts supports a Title VII claim and a non-Title VII claim against a federal employer, Title VII preempts the non-Title VII claim." Pet. App. 15a. Finding that the same set of facts supported petitioner's Title VII claim and her intentional infliction claims, the court concluded that Title VII preempted petitioner's intentional infliction claims. *Id.* at 14a-18a.

a. Petitioner contends (Pet. 9-11) that some of the factual allegations upon which she relies to support her intentional infliction claims do not support her Title VII claim. That fact-bound challenge to the decision below does not raise any issue of general importance and therefore does not warrant review.

In any event, the court of appeals correctly concluded that all of petitioner's allegations would be relevant in establishing a Title VII claim. Petitioner contends (Pet. 9) that some of the factual allegations upon which she relied to support her intentional infliction claims are not relevant to her Title VII claim, because they do not involve "sexual" conduct. Those allegations are that Gonzales requested money from petitioner, sought joint vacations with her, and made phone calls to her house. Title VII, however, does not require proof that harassing conduct is of a sexual nature. Rather, "any harassment or other unequal treatment of an employee or

group of employees that would not occur but for the sex of the employee or employees may, if sufficiently severe or pervasive, comprise an illegal condition of employment under Title VII." *McKinney* v. *Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985); see also *Hall* v. *Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) ("[i]ntimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances"); *Hicks* v. *Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) ("evidence of threats of physical violence and incidents of verbal abuse" would be considered along with evidence of sexual harassment in determining hostile work environment claim).

Applying that standard, Gonzales's alleged money requests, vacation demands, and phone calls are relevant to petitioner's Title VII claim. Those incidents allegedly occurred during the same time period that Gonzales engaged in repeated sexual advances, made lewd and suggestive comments, and demanded sexual relations. Pet. App. 10a-11a. Whether or not the incidents were non-sexual, they could help to establish that petitioner was subjected to a pattern of harassment that would not have occurred but for her sex and that was sufficiently severe and pervasive to affect the terms and conditions of her employment. The court of appeals therefore correctly concluded that those incidents are relevant to petitioner's Title VII claim.

Petitioner also contends (Pet. 10) that some of the conduct upon which she relies for her intentional infliction claims is not relevant to her Title VII claim, because it occurred after work hours, outside of work premises. When a supervisor harasses a subordinate after work hours and outside work premises, however, it can have a substantial effect on the way that employee experiences her working environment. Such

evidence is therefore relevant in establishing a Title VII hostile work environment claim. See *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 60 (1986) (plaintiff's allegation that her supervisor invited her to dinner, suggested at dinner that they go to a motel for sexual relations, and made repeated demands for sexual favors both during and after business hours, formed part of the basis for a Title VII sexual harassment claim).

In sum, all of the evidence upon which petitioner relies for her intentional infliction claims is also relevant to her Title VII claim. Petitioner's contention to the contrary is without merit.

b. Petitioner also contends (Pet. 7, 12-15) that the court of appeals' "same facts" test is not the correct standard for judging the preemptive force of Title VII, and that it conflicts with Ninth Circuit decisions holding that Title VII does not preempt FTCA and state law causes of action that involve a "highly personal violation beyond the meaning of discrimination." *Brock* v. *United States*, 64 F.3d 1421, 1424 (1995); see also *Arnold* v. *United States*, 816 F.2d 1306, 1311-1312 (1987); *Otto* v. *Heckler*, 781 F.2d 754, 756-758 (1986). For several reasons, that contention does not warrant review in this case.

First, only the Fifth and Ninth circuits have addressed the extent to which Title VII preempts FTCA and state law tort claims. That issue would benefit from further ventilation in the regional courts of appeals.

Second, the Ninth Circuit's decisions have all involved particularly aggravated forms of conduct; in no case has the sole claim been one of intentional infliction of emotional distress. *Brock*, 64 F.3d at 1421 (rape and assault); *Arnold*, 816 F.2d at 1312 (assault, battery, and

false imprisonment); *Otto*, 781 F.2d at 755, 757-758 (stalking and placing in fear of sexual assault resulting in a miscarriage). It is unclear whether the Ninth Circuit would conclude that intentional infliction of emotional distress without more is the kind of "highly personal violation beyond the meaning of discrimination" that is not preempted by Title VII.

Third, all of the Ninth Circuit cases involved claims based on conduct that predated the 1991 amendment to Title VII, which provides that victims of intentional discrimination may seek compensatory relief. The 1991 amendment was intended to afford the victims of sexual harassment compensation for injuries to "their mental, physical, and emotional health, to their self-respect and dignity, and for other consequential harms." 137 Cong. Rec. 30,661 (1991) (section-by-section analysis of Rep. Edwards). As a result of that amendment, Title VII now provides compensation for the same kinds of injuries that are alleged as a basis for claims of intentional infliction of emotional distress. The Ninth Circuit has previously held that Title VII preempted a state law tort suit for defamation when the plaintiff sought compensation for the same "injuries cognizable and remediable under Title VII." *Otto*, 781 F.2d at 757. In light of the 1991 amendment, the Ninth Circuit may reach a similar conclusion with respect to Title VII's effect on the tort of intentional infliction of emotional distress.

Fourth, in deciding the preemption question, the Ninth Circuit did not have the benefit of this Court's decisions in *Faragher* and *Ellerth* establishing the principles that govern the extent to which an employer is liable under Title VII for harassment committed by a supervisor. Because those decisions help to define the

reach of Title VII, they may also affect the scope of Title VII's preemptive effect.

Finally, employer liability decisions in the wake of *Faragher* and *Ellerth* may reduce the practical importance of the preemption question, particularly in conjunction with the 1991 amendment. Since plaintiff employees can more readily establish employer liability for supervisory harassment and can now obtain compensatory relief for a violation, they have less incentive than before to pursue FTCA and state law tort claims. Experience under the new rules for determining employer liability for supervisory harassment is necessary before an assessment can be made concerning the continuing importance of the preemption issue.

For all these reasons, the question concerning the correct legal standard for determining Title VII's preemptive effect on FTCA and state tort law therefore does not warrant review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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